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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 816.

ERNEST NEWTON KALB, PETITIONER,

VS.

HENRY FEUERSTEIN AND HELEN FEUERSTEIN, RESPONDENTS.

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI.

ELMER MCCLAIN,
Lima, Ohio,
WILLIAM LEMKE,
Washington, D. C.,
Counsel for Petitioner.

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REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI.

PRELIMINARY STATEMENTS.

The order of this reply brief is that of the Respondents' brief to which it replies.

Emphasis in this reply brief is supplied unless otherwise noted.

I.

REPLY TO ARGUMENT I (A AND B) IN RESPONDENTS' BRIEF THAT "THE DISTRICT COURT HAD THE POWER TO ISSUE A RESTRAINING ORDER PENDING THIS APPEAL" AND THAT THE BANKRUPTCY COURT HAS DEFINITE POWER "TO GRANT INJUNCTIONAL RELIEF" (Pages 6 to 8 of Respondents' Brief).

This argument is that the bankruptcy court had inherent power to restrain the mortgagor from exercising dominion over his farm, thus "preserving the *status quo*."

In doing so the District Court interfered with a subject which was foreign to the issue before it. It interfered with the decision of this Court by authorizing the mortgagees to continue their trespass. The *"status quo"* is the unhampered right of the mortgagor to occupy and cultivate his farm free from interference by the mortgagees. The possession of the mortgagees was held by this Court to be illegal and void. *Kalb* v. *Feuerstein,* 308 U. S. 433. That decision is binding upon the district court. The application by the mortgagor to be restored to his rights under Section 75 could not deprive him of his right to occupy his farm as mortgagor. Such right was not in issue.

Had the farmer debtor been in possession (as he would have been but for the illegal acts of the respondents here) and sought reinstatement by the bankruptcy court of his farmer debtor proceedings, certainly the bankruptcy court could not have ordered the farmer debtor to surrender that possession because it denied reinstatement of proceedings. At the bottom of page 15 of the petitioner's brief herein the judge of the bankruptcy court expressly stated that no power existed for restraining the mortgagor from going on his farm (R. 25).

The statement at the top of page 7 of the respondents' brief that "Both [restraining] orders were entered pursuant to an oral stipulation between the parties" refers to the restraining order set forth at page 28, folio 36, of the Record. The record does not show such a stipulation and none existed. On the contrary the record at the end of that order reads: "The farmer debtor excepts to the above order" (R. 28).

"Section 2 (a)" and "Section 2, subsection 21 (b)" (no doubt referring to Section 2 (b)) of the Bankruptcy Act relied upon at pages 7 and 8 of the respondents' brief are not to be so construed as to authorize a court

of bankruptcy to revoke a final decision of the Supreme Court of the United States.

By omitting to quote Section 2 (a) in full, the portion quoted in respondents' brief is made to seem to mean what it does not say. What it says is that bankruptcy courts shall have such jurisdiction "as will enable them **to exercise original jurisdiction in proceedings under this act . . . to**—(1) adjudge bankruptcy; (2) allow claims; (3) appoint receivers, etc.; (4) punish for violations of the act; (5) authorize continuance of business; (6) bring in new parties; (7) collect estates; (8) close estates; (9) confirm or reject arrangements; (10) consider referees' orders; (11) determine exemptions; (12) issue discharges, etc.; (13) enforce lawful orders; (14) extradite bankrupts; (15) enforce the Act; (16) punish contempts before referees; (17) appoint trustees; (18) tax costs; (19) transfer cases; (20) exercise ancillary jurisdiction in bankruptcy cases pending elsewhere; (21) require receivers, etc., in other proceedings to account."

That is Section 2 (a) merely enumerates twenty-one kinds of bankruptcy powers. **No general power is granted.**

Nor does Section 2 (b) (quoted by respondents as "Section 2, subsection 21 (b)") grant any power to a bankruptcy court by which it may restrain a mortgagor from entering upon his property.

II.

REPLY TO RESPONDENTS' ARGUMENT II THAT THE DISMISSAL OF THE FARMER DEBTOR PROCEEDINGS DID NOT DEPRIVE THE FARMER DEBTOR OF THE BENEFITS OF SECTION 75 (s) (Pages 9 to 14 of Respondents' Brief).

The respondents assert that the petitioner was not deprived of any right by the dismissal of his proceedings without any notice that dismissal was sought or contemplated, without hearing and without notice that the order of dismissal had been entered.

A.

(Pages 9 to 10 of Respondents' Brief.)

That "A Debtor Under Section 75 May Amend His Petition at Any Time."

The respondents say that a farmer debtor "may amend his petition at any time." He may not do so except as prescribed by Section 75. If he could there might be two proceedings pending at the same time, one under Section 75 (a) to (r) for composition or extension and one under Section 75 (s) for the moratorium.

The law contemplates an effort for rehabilitation to be supervised by a conciliation commissioner whose office was especially created for that purpose. The court appointed the conciliation commissioner and referred the case to him for that purpose. The reference to the conciliation commissioner may be terminated only by his report and the order of the court which issued the order of reference. At any time before the conciliation commissioner makes final report to the court on the reference to him, the necessary number in amount and number of creditors may accept the proposal of the farmer debtor. Until such report there is no opportunity for the farmer debtor to invoke Section 75 (s) and "amend his petition or answer, asking to be adjudged a bankrupt" (quoted from the first sentence of Section 75 (s)). He may "amend his petition" only in the court where he filed it; he can not amend a petition which is before a conciliation commissioner for the conduct of proceedings which must be completed and reported to the court before there can be an amendment. In fact Section 75 (e) provides that the conciliation commissioner shall "after hearing the parties in interest fix a reasonable time within which application for confirmation shall be made, and may later extend such time for cause shown."

No such order was ever issued in this case. In fact negotiations between the petitioner and the respondents

continued right up to the time of the dismissal which occurred five days after the petitioner was evicted and the respondents were put in possession. And the conciliation commissioner knew of these pending negotiations. See the Amended Petition for Reinstatement in the record beginning at the first whole paragraph at page 15 and ending at the top of page 17. Also the Affidavit of the Respondent Feuerstein in the Record beginning at page 19, folio 24, and ending on page 20 at the beginning of folio 26.

The orderly procedure followed by the bankruptcy courts generally is that a notice and order to show cause is issued to the farmer debtor notifying him that the final report of the conciliation commissioner has been filed and ordering him to show cause why his proceeding should not be dismissed unless he files an amended petition by a specified time.

A farmer debtor may not exercise "his privilege to elect whether or not to become a bankrupt" (quoted from page 14 of the respondents' brief) until he has notice that he may exercise that privilege. It is a contradiction of thought and language to assert that one may "abandon" or "waive" that which he was not notified that he had.

B.

(Pages 10 to 11 of Respondents' Brief.)

It is urged that the dismissal did not deprive the petitioner of the benefits of Section 75 (s).

Contrary to the statement in the respondents' brief at the middle of page 10 of their brief that the record does not state that the proceedings were dismissed without notice, it is specifically so stated at page 16 of the record in the first full paragraph in folio 20. The docket of the bankruptcy court at page 3 of the record in the two entries of March 17, 1936, one noting the final report of the conciliation commissioner, and the other noting the order of dismissal **(on the same day)** clearly show no notice was given. Likewise the Report of the conciliation

commissioner at page 11 of the record in the "Fifth" paragraph shows no notice.

Whereas the statute contemplates that the bankruptcy court shall conserve and protect the rights of the farmer debtor and specifically provides in Section 75 (q) that a farmer debtor need not have counsel "in any proceeding under this section" and requires the conciliation commissioner to assist him, we find no evidence in this case that the spirit and requirement of the statute were observed. On the contrary we see two final reports (R. 6 and R. 10) and two dismissals without notice (R. 9 and R. 11), and the record contains at the foot of page 16 of the Record the statement of the petitioner that the conciliation commissioner "rendered no assistance of any kind."

C.

(Pages 11 to 14 of Respondents' Brief.)

That "Notice of Dismissal Need Not Be Given."

It is further asserted that notice need not be given to the farmer debtor of the dismissal of his petition. This is indeed a novel proposition devoid of support by any authority.

We will here proceed to examine the five citations to support this assertion which are found on pages 11 and 12 of the respondents' brief, namely:

(1) 1 Remington, Fourth Edition, page 47, Paragraph 21.

(2) 1 Remington, Fourth Edition, page 50, Paragraph 22.

(3) 15 Ruling Case Law, page 633, Paragraph 76.

(4) *Gratiot, etc.*, v. *Johnson, Trustee*, 249 U. S. 246.

(5) *Massey* v. *Farmers, etc.*, 94 F. 2d 526.

These citations which harmonize with well recognized principles of law mean that **once a judgment** *in rem* **is by due process of law properly rendered it is** *res judi-*

cata **as to itself—not as to all persons for all things.** For example: Adjudication in bankruptcy is *res judicata* and is effective as such to all the world. But it does not mean that a man may be adjudicated bankrupt without notice to him. Elaborate provisions were contained in Sections 18 and 19 of the Bankruptcy Act of 1898, and are now contained in the same sections of the present Act of 1938, for notice as in a suit in equity, for pleadings and for trial by jury. Nor does it even mean that adjudication in voluntary bankruptcy without notice is a final determination. If after such adjudication it appear, upon motion to dismiss after notice and hearing, that the jurisdictional allegations in the petition are untrue, the adjudication may be vacated and the case dismissed.

Remington on Bankruptcy.

(1) and (2) The quotations from Remington are only a part of what that author says on the subject. At the end of the section 21 from which the respondents quote he says: "Indeed they are both proceedings *in rem* and in some phases **also proceedings in personam.**" At Section 25 he says: "The bankruptcy act is remedial and should be interpreted reasonably and according to the fair import of its terms, with a view to affecting its objects and to promote justice." And in Section 27 he says in relation to Celerity of Proceedings: "While proceedings in bankruptcy may be summary, they should not be so summary as to deprive a party of **those fundamental rights that belong to every citizen, among which are the rights to be advised by the demand made upon him, and after being so advised to have a reasonable time to prepare his defense and produce his witnesses.**"

Likewise in his Chapter XXXVI on Summary Jurisdiction over the Bankrupt, Remington says in Section 2406. **"Reasonable notice must be served on the bankrupt** or other party upon whom the order is requested so that he may have reasonable time to prepare for his

defense." In Section 2407 he says: **"The ordinary notice is that of an order to show cause."** And in 2408: **"Due hearing must be had, and reasonable opportunity therefor is requisite."**

In support of the foregoing statements Remington quotes at length from three opinions: *In re Rosser,* 4 A. B. R. 153 (1900); *Boyd* v. *Glucklich,* 8 A. B. R. 393 (1902), and *In re Frank,* 25 A. B. R. 486 (1910).

In re Rosser.

The first case cited and quoted by Remington is *In re Rosser,* 4 A. B. R. 153 (1900), which involved an order upon a bankrupt to turn over $2,500 to the trustee. This order was issued after the examination of the bankrupt at the first creditors' meeting. The bankrupt being committed to jail for failure to obey the order, objected that he had not been notified that the turnover order was to be a subject of consideration at the creditors' meeting. In its decision the Circuit Court of Appeals for the Eighth Circuit said:

> "He was cited to appear and be examined under Section 21 of the Bankrupt Act and his testimony and that of various other witnesses were taken before the referee upon that citation, but no notice was served upon him that the claim, which culminated in the order for the payment of the $2,500, was made or was in issue at that examination, or that the testimony there elicited was taken for the purpose of establishing that claim, and no opportunity was presented to him to produce witnesses in his defense or to be heard upon the issues of fact or of law which the issue of the order involved. Such a proceeding lacks every element of due process of law. It contains no notice to the party affected of the claim against him, or of the proposed action upon it, no opportunity to contest the questions of fact which it presents by the cross-examination of the claimant's witnesses or the presentation of his own, and no chance to be heard upon the questions of law which it involves. **It considers without notice, condemns**

without hearing, and renders judgment without trial. The order of the referee **was** unlawful and **void.**"

Boyd v. Glucklich.

The second opinion which Remington quotes is *Boyd* v. *Glucklich,* 8 A. B. R. 393 (1902). That opinion said:

> "It will be observed that the application of the trustee was not for an order of the bankrupt to show cause, upon reasonable notice, why he should not be required to turn over to the trustee the money and property mentioned in the application, but was for an immediate and unconditional order to be then made, based on the general and desultory examination of the bankrupt which had just been concluded."
>
> . . . . . .
>
> "Dispatch in judicial proceedings is commendable, but, in proceedings involving the liberty of **a citizen,** he **has a right not only to be informed of the precise claim against him, but, after receiving that information, he has a right to a reasonable time to prepare his answer and present his proofs,** and, lastly, **to be heard by counsel on the law and facts of the case.** While proceedings in bankruptcy may be summary, they should not be too summary; in other words, they should not be so summary as to deprive the bankrupt of those fundamental rights and privileges that belong to every citizen, among which are the right to be advised of the demand made upon him, and the right, after being so advised, to have a reasonable time to prepare his defense and produce his witnesses. **The Bankrupt Act does not do away with these rights,** and **no citizen forfeits them by being adjudged a bankrupt.**"

In re Frank.

The third opinion quoted by Remington is that of *In re Frank,* 25 A. B. R. 486 (1910), where the bankrupt was given **two days notice** of a hearing which resulted in an order upon him. The Circuit Court of Appeals held that **the order was void** for want of adequate notice.

Galpin v. Page.

These authorities relied upon the decision of this Court in *Galpin* v. *Page*, 85 U. S. (18 Wall.) 350, 368, where it said:

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

Ruling Case Law.

(3) The quotation from 15 Ruling Case Law 633, Section 76, at pages 11 and 12 of respondents' brief, is ripped from its setting. By "direct notice" the context shows that constructive notice by publication in a newspaper will bind the interest of a non-resident in real or personal property which has come into the jurisdiction of the court where such property is situated.

Gratiot v. Johnson.

(4) The case of *Gratiot, etc.*, v. *Johnson, Trustee*, 249 U. S. 246, cited as the fourth authority at page 12 of respondents' brief, illustrates the principle that a proceeding *in rem* does not deprive any person of the right to his day in court. After due pleadings and hearings there was an adjudication in involuntary bankruptcy upon the ground of preference during insolvency. The bank so found to have been preferred was sued by the Trustee in a state court to recover the preferential payments so received. The state courts held (as argued by the respondents in this Kalb case) that the adjudication was *res judicata* and rendered judgment against the bank for the amount of the preferred payments. Upon certiorari this Court held that **the adjudication** was *res judicata*

against the bank as to bankruptcy upon the ground that it received a preference.

But, although the bank had due notice of the petition in bankruptcy and of the charge that it received a preference, this Court said at page 252: "The allegation in the involuntary petition that the bank was among those who had received preference did not impose upon it the duty to appear to answer; and since it did not do so even a finding to that effect by the bankruptcy court would not have bound it." Here we have the preferred payment which was adjudged to be *res judicata* as to bankruptcy being held not to be conclusive against the payee. **Due process of law was assured to the bank by preserving the right to its day in court.**

Massey v. Farmers.

(5) Concerning the respondents' fifth authority, they say about it at page 12 of their brief:

> **"We think the language of the court** in *Massey* v. *Farmers & Merchants National Bank & Trust Company,* 94 F. 2d 526, at page 530, **is controlling on this question."**

Although the respondents say this decision in *Massey* v. *Farmers* is "controlling on this question" of whether the District Court rightly dismissed Mr. Kalb's case, that decision was based upon quite another point of law and the court was careful not to rest its decision upon due process. In five different ways the opinion so indicated. (1) Said the Court: "It would no doubt have been proper practice upon the filing of the report [of the conciliation commissioner] to have notified the debtor to show cause . . . why the report should not be approved and the debtor's petition dismissed." (2) Further, the decision continued, it could not be said that such dismissal was error because it was shown in the conciliation commissioner's report "that the debtor's petition had not been filed in good faith." (3) Also that, "In the

meantime the order restraining the bank . . . remained in effect." (4) In a later portion of the opinion (not quoted by the respondents) the court said, "Moreover, it can not be said that the debtor had no opportunity to present her views before the case was finally disposed of . . . **Counsel had an opportunity to be heard and an opinion was filed** . . . in which the facts were discussed on their merits and the absence of good faith was noted that was essential to the maintenance of the original as of the amended petition. **The debtor was not denied an opportunity for a fair hearing.**" (5) The court then cited and quoted from Note 6 in *Wright* v. *Vinton*, 300 U. S. 440, at 462, as authority for dismissing the proceeding for "lack of good faith."

It is clear that the court considered lack of notice of dismissal to be a moot issue because, as it said, (a) the debtor "was not denied an opportunity for a fair hearing," (b) the restraining order had been maintained against the bank and, (c) chiefly, because this Court in Note 6 in *Wright* v. *Vinton* had held that a farmer debtor petition not filed in good faith was subject to dismissal. In support of its power to dismiss for lack of good faith the opinion cited six other decisions holding that farmer debtor proceedings were subject to dismissal for lack of good faith. The whole force and effect of *Massey* v. *Farmers* was grounded upon Note 6 which was repudiated in *John Hancock* v. *Bartels*, 308 U. S. 180, at 184, in Note 3, where this Court said: "What is said upon this point in Note 6 in *Wright* v. *Vinton Branch*, 300 U. S. 440, 462, was not essential to the opinion in that case and is not supported by the terms of the statute."

The respondents make a point of the fact that in the Massey case a "Writ of certiorari to the Supreme Court of the United States was dismissed." The whole truth is that certiorari was "Dismissed on motion of counsel for petitioners" (Quoted from 303 U. S. 665).

In re Henderson.

The respondents then cite *In re Henderson,* 100 F. 2d 820 (C. C. A. 5), as supporting *Massey* v. *Farmers.* But it is equally devoid of weight. The Henderson decision by two judges, Judge Hutcheson dissenting, doubtfully questioned whether the farmer debtor could complain of dismissal of his proceeding without notice, and cited the *Massey* v. *Farmers* decision. The second headnote of the report of the case in 38 A. B. R. (N. S.) 213 reads: "And it is doubtful whether he can assert that his petition was prematurely dismissed, even though he was given no notice of the proposed dismissal." Like *Massey* v. *Farmers,* the Henderson decision considered the issue of dismissal without notice to be a moot question. **It was based squarely upon lack of good faith** and cited Note 6 in *Wright* v. *Vinton, Massey* v. *Farmers,* and six other decisions, all of which were overruled by *John Hancock* v. *Bartels,* 308 U. S. 180. In his dissenting opinion Judge Hutcheson declared the courts have no power to dismiss farmer debtor proceedings and his dissent was approved by this Court in *John Hancock* v. *Bartels* which overruled *In re Henderson, Massey* v. *Farmers,* and all like decisions.

We believe it has been demonstrated that neither *Massey* v. *Farmers* nor *In re Henderson* lends any support to the assertion that the District Court could properly dismiss Mr. Kalb's case without notice and without hearing.

None of the five authorities which are cited by the respondents supports their argument that bankruptcy proceedings may be dismissed without notice. On the contrary such dismissal is specifically prohibited by statute. Section 59 (g) of the Bankruptcy Act of 1898 (which was in force when Mr. Kalb's petition was dismissed) reads as follows:

> **"A voluntary** or involuntary **petition shall not be dismissed** by the petitioner or petitioners or **for want**

> **of prosecution** or by consent of parties **until after notice** to the creditors **and** to that end **the court shall, before entertaining an application for dismissal,** require the bankrupt to file a list, under oath, of all of his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall **delay the hearing thereon for a reasonable time to allow all** creditors and **parties in interest opportunity to be heard."**

Section 59 (g) of the present Bankruptcy Act of 1938 contains more detailed and stringent provisions relating to dismissal.

But say the respondents at the bottom of page 13 of their brief, the petitioner was no more denied due process than any bankrupt whose case is dismissed for failure to apply for discharge. The Bankruptcy Act of 1898 in Section 14 **specifically** made it the duty of the bankrupt to file his application for discharge.

The other contentions of the respondents in their Argument II have been fully discussed in the petitioner's brief at page 31 beginning at paragraph 3; also at page 23 ("The Farmer Debtor Complied with the Farmer Debtor Law and Obeyed the Order of the Bankruptcy Court"). Also at page 30 of the petitioner's brief in the discussion of the opinion of the judge of the bankruptcy court, under paragraph numbered 1; and at the bottom of page 24 of the petitioner's brief, beginning with the words "Certainly no default."

III.

REPLY TO RESPONDENTS' ARGUMENT III THAT THE PETITION WAS PROPERLY DISMISSED BY THE BANKRUPTCY COURT BECAUSE THE FARMER DEBTOR DID NOT MAKE "TIMELY APPLICATION FOR THE BENEFITS OF SUBSECTION (S)" (Pages 15 to 19 of Respondents' Brief).

Here the respondents suggest that the case was properly dismissed because of the petitioner's failure to make "timely application" under Section 75 (s).

The petitioner on September 6, 1935 (which was nine days after the enactment of the present Section 75 (s) on August 28, 1935), prayed "that the said petition heretofore filed by him . . . be reinstated and he be given relief in accordance with Section 75 thereof as amended" and his application specifically referred to the new Section 75 (s) (R. 9 and 10). It may be noted with reference to this application that in the Borchard case (*Borchard* v. *California Bank*, 310 U. S. 311, 314) that a like "petition for reinstatement" was employed to reinstate a dismissed farmer debtor proceeding.

Without discussing their proposition III as a whole the respondents' brief divides it into three parts, A, B, and C, which are accordingly separately discussed here.

A.

(Pages 15 to 16 of Respondents' Brief.)

The respondents say that to assert that the farmer debtor case was dismissed by the bankruptcy court because of his eviction from his farm is to impeach the record. The record is silent upon that subject and the suggestion offered in the petitioner's brief is not inconsistent with, or contradictory to, the record. The respondents concede at page 15 of their brief that the district court's opinion at the end of the second paragraph at record page 25 incorrectly stated that the conciliation commissioner's report was made before the unlawful eviction by the state court (See the second paragraph after the heading on page 15 of the respondents' brief). And yet in that paragraph the respondents say: "It should first be observed that the conciliation commissioner's report was **dated March 11, 1936.** At that time Kalb was still in possession of his farm." The **date** of the report is immaterial. The fact that he dated it one day prior to the eviction and filed it on March 17, five days after the eviction, is **strong evidence that he knew that eviction**

was imminent. He no doubt also knew that the State Court had issued a writ of assistance many weeks before. He merely waited until after the eviction to file his report (R. 10 and 11).

A comparable situation was presented to the appellate court below in *In re Monjon,* (C. C. A. 7) 113 F. 2d 535. That court said:

> "However it is noted that **the authorization to continue foreclosure closely followed the decision of the Supreme Court in the case of Louisville Joint Stock Land Bank v. Radford,** 295 U. S. 555, wherein that Court declared the Frazier-Lemke Act, as it then stood, unconstitutional. **Also, the debtor's petition to dismiss followed rather closely upon the ruling of this court in Re Lowmon,** 79 F. 2d 887, wherein this court held the amended Frazier-Lemke Act unconstitutional as applied to facts very similar to those involved in the proceeding then in progress."

B.

(Pages 16 to 18 of Respondents' Brief.)

Assuming that the farmer debtor failed to file a written offer the respondents claim that dismissal of his farmer debtor petition was thereby **required.** If so he was entitled to notice and a hearing. This is especially true because the commissioner himself reported that **"due effort was made to effect a composition or extension"** and that "such efforts failed because of the refusal of the principal secured creditor [the respondents here] to accept **debtor's proposal,** or to enter into negotiations for adjustment" (Record page 8, First Report of Conciliation Commissioner, seventh paragraph. Record page 16, Amended Petition for Reinstatement, Folio 20). In his second Report, nine months later (R. 10 and 11, Folio 12), the conciliation commissioner, after stating that the farmer debtor appeared at three called creditors' meetings but no creditor appeared, reported that the farmer debtor

"failed to make any offer to creditors and failed to file an amended petition and therefore this conciliation commissioner recommends that this petition be dismissed."

The statute does not require a written proposal. There was none in the Bartels case. We will examine the Bartels offer.

Comparison Between the Farmer Debtor Proceedings in John Hancock v. Bartels, 308 U. S. 180, and in This Kalb Case.

The Bartels Proposal.

There was no written proposal in the Bartels case. The following is quoted from the conciliation commissioner's report at page 3 of the record filed in the Bartels case. After reciting the date of the creditors' meeting (December 21, 1937) and naming those present the commissioner's report continues:

> "A detailed examination was made of the debtor's financial condition and after discussions the said debtor proposed to sell personal property valued at approximately $250 and also sell a lot which he owns situated in San Antonio, Texas, and apply the proceeds thereof to liquidate part of the delinquencies to the John Hancock Mutual Life Insurance Company. At the same time the debtor proposed to fully pay all delinquencies remaining unpaid to said John Hancock Mutual Life Insurance Company within three (3) years, but the said Insurance Company declined to accept such proposition. The debtor made an agreement with Mrs. Kraft and Mrs. Sauer for an extension of their debts but was unable to obtain an agreement with a majority of the creditors in number and amount."

The stenographic report of the creditors' meeting in the Bartels case occupies pages 15 to 67 of the record. It shows conclusively that the proposal was verbal, not written.

Page 56 of the Bartels record contains the following:

> "The Commissioner: Mr. Bartels, the only way that I can see that you can in any way get by is to apply the money that you get from your store, and to sell those lots that you have up in San Antonio even if you don't get $500 for them, and turn that money over to Martindale Mortgage Company and then probably make some kind of a proposition and get them to give you more time on the rest. It looks like you are going to have to do that before you—
>
> Mr. Bartels: I am willing to do it; sure, I am willing to do everything I can.
>
> The Commissioner: Well, now if you turn in the money that you get from the sale of your store, and turn in those lots in San Antonio, say, for instance, those lots would be worth $400 and your interest in the store $200, that is $600. If he applied that on this debt do you think that you could work out some method by which you could extend the rest of this debt?
>
> Mr. Leslie: I don't think so. . . ."

From page 65:

> "The Commissioner: . . .
>
> Now, as I understand it, that is all the proposal, that is all you can do, that is the only suggestion you have to make, Mr. Bartels?
>
> Mr. Bartels: Yes, sir."

At page 182 of the Bartels opinion, the creditors' meeting and the offer are summed up as follows:

> "A meeting of the creditors was held on December 21, 1937, at which the debtor was present and was examined. It appeared that his debts amounted to about $10,000 of which about $8,000 (including interest and attorney's fees) was owing to the John Hancock Mutual Life Insurance Company and was secured by a lien upon his home. As the debtor was unable to obtain an agreement with a majority of his creditors in number and amount, he notified the commissioner that he would apply to be adjudged a bankrupt under subsection (s) of Section 75."

In the respondents' brief in this pending Kalb petition for certiorari it is assumed that the Bartels case differs from the Kalb case in that Mr. Bartels filed an amended petition under Section 75 (s) whereas Mr. Kalb did not. It is true that Mr. Bartels filed an amended petition and was adjudicated a farmer debtor bankrupt. But on motion of the secured creditor the adjudication was vacated and the amended petition was dismissed. The court then dismissed the whole proceeding. This placed the Bartels case in exactly the same situation as the present Kalb case, that is, with proceedings under Section 75 (a) to (r) completed and his case dismissed. This Court said: "The farmer debtor may offer to pay what he can, as Bartels did, and he is not to be charged with bad faith in taking the course for which the statute expressly provides." 308 U. S. 180, at the top of page 185.

The Kalb Proposals.

The conciliation commissioner's Report in this Kalb case discloses proceedings parallel to those in the Bartels case. At record page 6, folio 8, in this case the conciliation commissioner's report at the top of record page 8 reads:

> "Seventh. That at said meeting the debtor was examined by the conciliation commissioner and by his creditors; that **due effort was made to effect a composition or extension of time for the payment of debts;** that **such efforts failed because of the refusal of the principal secured creditor** [the respondents here] **to accept debtor's proposal, or to enter into negotiations** for adjustment."

In the second conciliation commissioner's Report at record page 10, folio 12, at the top of page 11 he reports that at three creditors' meetings the farmer debtor appeared each time; that no creditor appeared; and that the farmer debtor made no offer and filed no amended petition. Upon this basis the conciliation commissioner recommended dismissal.

We think the Kalb case presents a more favorable situation for the farmer debtor than did the Bartels case and points to the same conclusion.

We will here discuss the three cases relied upon by the respondents in support of their contention that Section 75 requires a written offer.

1. In re Vater, 14 Fed. Supp. 631.

(Cited and partially quoted at page 17 of Respondents' Brief.)

The full report of the decision shows that the farmer debtor made a proposal of which the District Court did not approve. Following certain Samuelson, Hilliker, Borgelt and Richert decisions, the court dismissed the whole case. This Court in *John Hancock* v. *Bartels*, reversed all of these decisions, including *In re Vater*. Note 6 in *Wright* v. *Vinton*, 300 U. S. 440, at page 463, expressly cited this Vater decision in its support. Note 6 was repudiated by this Court in Note 3 of its later decision in *John Hancock* v. *Bartels*, 308 U. S. 180, at 184, and thereby the Vater case was definitely overruled. The Vater decision held that the farmer debtor must make an **offer.** We agree. The quotation submitted by respondents fails to support the thesis that the offer must be written.

2. In re Ballard, 10 Fed. Supp. 549.

(Cited and quoted at page 17 of Respondents' Brief.)

In this case only two creditors filed claims and the farmer debtor, believing he could not obtain a majority of all when but two filed claims, filed his amended petition. The District Court declined **"without prejudice"** to accept it. The court explained that only those creditors who filed proofs of claim could vote and those who did not file were not to be counted in determining a majority in number and amount of claims. The farmer debtor was left free to seek the consents of the two creditors who filed claims before filing an amended petition. **The case**

was not dismissed. The decision holds that an offer must be made, not that it must be in writing.

3. In re McMurray, 8 Fed. Supp. 449, 453.

(Cited and quoted at page 18 of the Respondents' Brief.)

It suffices to quote from the concluding sentence of the opinion in the McMurray case: "It appearing that **the debtor is not a farmer** within the meaning of the Act, the cause and proceedings herein are dismissed, . . ." That was the end of the matter because the court had no jurisdiction of the person or of the subject matter. The court further held that the proposal was defective under original Section 75 (k) because it impaired a lien. That provision has been repealed. The present Section 75 (k) permits such impairment. As in the two other quotations offered by respondents, this decision does not require a written offer.

The three decisions put forth by the respondents hold that a farmer debtor is required to make diligent effort to obtain composition or extension from his creditors. The conciliation commissioner's report in the Record at the top of page 8 shows that he made "due effort" and that the respondents caused it to be rejected.

In re Cresap.

(Pages 18 and 19 of Respondents' Brief.)

The respondents cite and quote *In re Cresap*, 99 F. 2d 722, 727, to prove that "The benefits of subsection (s) will be extended only to those debtors who make application therefor." Agreed.

The petitioner Kalb in this case made such application in his "Petition for Reinstatement" (R. 9). He cited the amendment of Section 75 by the present Section 75 (s) and prayed that "he be given relief in accordance with Section 75 thereof as amended." He had no control over either the conciliation commissioner or the bankruptcy court as to how his proceedings were to be

administered. He diligently obeyed every order of either court or conciliation commissioner, as has been shown beginning at page 23 of the petitioner's brief.

The first holding in the Cresap decision was: "It is clear from this evidence that **the debtor . . . was not a farmer** within . . . subsection (r)." He had not for sixteen years "lived on a farm, or operated one, or realized any substantial part of his income from farming operations." He worked in railroad shops. That disposed of the case. We see no fault in the further observations as quoted in the appellees' brief, especially that portion which states that "A reasonable construction of that subsection [n] would continue that jurisdiction for the purpose of permitting the debtor to ask for an adjudication if he failed in the composition providing he asked for it within a reasonable time and before his reinstated petition for composition was rightfully dismissed."

IV.

REPLY TO RESPONDENTS' ARGUMENT IV THAT THE DISMISSAL OF THE FARMER DEBTOR PROCEEDINGS IS CONCLUSIVE, BEING RES JUDICATA (Pages 15 to 30 of Respondents' Brief).

In their Proposition IV the respondents suggest that this court is bound by the doctrine of *res judicata* to accept as final the dismissal without notice or hearing and thus leave the petitioner without the benefits of Section 75 (s).

It is suggested that ten unanimous decisions of this Court in considering every flaw suggested by objecting creditors has left no doubt that Section 75 is to be administered in full sympathy with its purpose and not in the spirit of seeking ways to evade it. These ten decisions are:

1. *Wright* v. *Vinton,* 300 U. S. 440.
2. *First National Bank* v. *Beach,* 301 U. S. 435.
3. *Adair* v. *Bank,* 303 U. S. 350.

4. *Wright* v. *Union Central,* 304 U. S. 502.

5. *John Hancock* v. *Bartels,* 308 U. S. 180.

6. *Gray* v. *Union Joint Stock Land Bank,* 308 U. S. 523.

7. *Morrison* v. *Federal Land Bank of Louisville,* 308 U. S. 524.

8. *Kalb* v. *Feuerstein,* 308 U. S. 433.

9. *Borchard* v. *California Bank,* 310 U. S. 311.

10. *Wright* v. *Union Central,* ..... U. S. ....., 61 S. Ct. 196.

All captious suggestions aimed at clipping away here and there the effectiveness of Section 75 have been disapproved. This Court has repeatedly indicated that every farmer debtor who invokes Section 75 is to have the benefit of all its provisions. Most of the courts are now wholeheartedly following the interpretations of this Court. However in 1935 when this Kalb proceeding was dismissed there was much disagreement with the spirit and purpose of the law.

We do not understand how a dismissal of a case without notice and without hearing can be *res judicata* so as to deprive the farmer debtor of his statutory right to the benefits of Section 75 (s). Especially when, as here, the dismissal occurred on the same day that the conciliation commissioner, without notice or hearing, filed his recommendation of dismissal. We think there is a "higher law" which says there can be no wrong without its remedy. Courts of equity do not embrace suggestions aimed to deny the remedy. They seek to preserve it.

To sustain their suggestion that there is no remedy against the dismissal without notice or hearing the respondents rely upon six decisions. They are:

1. *Wilcons* v. *Penn,* 104 F. 2d 456 (C. C. A. 10) (1939).

2. *In re Oyler*, 20 Fed. Supp. 595 (District Court, Ohio) (1936).

3. *McWilliams* v. *Blackard*, 96 F. 2d 43 (C. C. A. 8) (1938).

4. *In re Archibald*, 14 Fed. Supp. 437 (District Court, Minnesota) (1936).

5. *In re Henderson*, 100 F. 2d 820 (C. C. A. 5) (1938).

6. *Union Joint Stock Land Bank* v. *Byerly*, 310 U. S. 1 (1940).

Each of these decisions is readily distinguished. We discuss them here.

Wilcons v. Penn.

1. *Wilcons* v. *Penn*, 104 F. 2d 456 (C. C. A. 10) (1939), is cited at page 19 of the respondents' brief. There were two appeals, the first (*Wilcons* v. *Penn*, 91 F. 2d 417 (1937)) held that motions to dismiss should have been controlled by Section 75 (o). Pending the appeal in the first case the mortgage holders took deeds in foreclosure just after the state statutory period of redemption normally would have expired. On the second appeal which is the case cited by the appellees (*Wilcons* v. *Penn*, 104 F. 2d 456 (1939)) it was held that the delivery of the deed pending the first appeal divested the farmer debtor of all title because he had not filed an amended petition under Section 75 (s).

This second Wilcons decision was based uopn the theory that after the conciliation commissioner filed his final report of proceedings for composition or extension the bankruptcy court's jurisdiction was ended and the state court's jurisdiction was revived. The decision disregarded two provisions of the statute, namely, Section 75 (n) (as amended August 28, 1935) providing that "The filing of a petition . . . under Section 75 . . . shall immediately subject the farmer and all his property . . . for all the purposes of this section [**not merely a part but all of the section** from (a) to (s)] to the exclusive jurisdiction of

the court . . ."; and the other provision in Section 75 (n) (as so amended) that . . . "Where deed had not been delivered, the period of redemption shall be extended . . . for the period necessary for the purpose of carrying out this section," that is the whole section, from (a) to (s). The words **"this section" mean the entire Section** 75 (a) to (r) and (s), **not part of it.**

Since Wilcons and his lands were in the exclusive jurisdiction of the federal court for more than a year after the mortgage holders took deeds in foreclosure from the state court therefore the decision is indeed very questionable because this Court more than once has declared that a bankruptcy court is without power to divest itself of jurisdiction. *Isaacs* v. *Hobbs,* 282 U. S. 734, 739; *Gross* v. *Irving,* 289 U. S. 343, 344; *Taylor* v. *Sternberg,* 293 U. S. 470, 473; *Thompson* v. *Magnolia,* 309 U. S. 478, 483. Granting that the effect of Section 75 (o) had expired, Section 75 (n), which reposed exclusive jurisdiction in the federal court and extended the state redemption period for all purposes of Section 75 still applied. The decision of this court in *Wright* v. *Union Central,* 304 U. S. 502, was not considered by the Circuit Court of Appeals in the Wilcons case although it had been announced the previous year.

But even if this Wilcons decision were good law there was in it **no lack of due process by want of notice and hearing.** It is not authority for the suggestion that the Kalb dismissal is *res judicata.* Each step in both Wilcons cases was the subject of hearings. Full hearings were had before the conciliation commissioner and before the District Court. Having observed the proprieties of the law by giving the farmer debtor his full day in court on every issue in accordance with due process the court no doubt had the "power to decide erroneously."

In re Oyler.

2. *In re Oyler,* 20 Fed. Supp. 595 (1936) (District Court of Ohio), is cited and quoted at pages 21 to 23 in the respondents' brief.

Because the respondents' brief has continued into this court two misstatements about this Oyler decision which were made in the court below, we relate the particulars. The respondents' brief does not truly state the issue and the case has no application. First misstatement: The respondents' brief (at the foot of page 21) says "the matter came before the court on the motion of a creditor for dismissal because of the failure of the debtor to make a *bona fide* offer of composition or extension of his debts. The motion was granted." Second misstatement: The respondents' brief (at the top of page 22) purports to quote from the report of the case in 20 Fed. Supp. 595, as follows: " 'Case comes up on motion of a creditor for dismissal because of the failure of the debtor to make a *bona fide* offer of composition or extension of his debts. Motion granted.' " The foregoing statement is not true, and the quoted paragraph does not appear in the report of the case in 20 Fed. Supp. 595, nor does it appear in 33 A. B. R. (N. S.) 738, nor in paragraph 4749 of Bankruptcy Law Service where the case is also reported. The Court expressly declined to consider "lack of good faith."

Following the enactment of the present Section 75 (s) on August 28, 1935, the District Court reinstated the case. The secured creditor moved to dismiss upon five grounds: (1) that the case was never pending under the original 75 (s); (2) that it was never pending under the new 75 (s), (3) and (4) that the new Section 75 (s) was unconstitutional; and (5) that the farmer debtor did not make a proposal in good faith.

After considering grounds (1) and (2) and deciding that the Oyler proceeding was never pending under either the original or the new Section 75 (s) and therefore could not be reinstated, the court said in the last sentence of the opinion: "The court does not deem it necessary to consider the other grounds urged for dismissal." The grounds thus not considered were (3) and (4) "unconstitutionality" and (5) "lack of good faith." Therefore, the statement in the respondents' brief ("the matter

came before the court on the motion of a creditor for dismissal because of the failure of the debtor to make a *bona fide* offer of composition or extension of his debts. The motion was granted") is not correct.

An examination of the case will disclose its inapplicability. On July 2, 1935, after the original Section 75 (s) was held invalid and before the present Section 75 (s) was enacted (thus leaving Section 75 (a) to (r) as the only and final procedure) the case was dismissed on the ground, which was put into an entry, that the commissioner was "unable to reach a conciliation agreement of composition or extension." This entry was approved by all parties "including the attorney for the debtor" as the decision states at one place. At another place the court said the order of dismissal was "acquiesced in by counsel for the debtor." Thus **the issue of dismissal without notice was not in the Oyler case.**

McWilliams v. Blackard.

(3) *McWilliams* v. *Blackard,* 96 F. 2d 43 (C. C. A. 8) (1938), is cited at page 23 of respondents' brief. This decision is also foreign to any subject involved here for it concerns only the doctrine of "The Law of the Case," which is that an issue once heard and decided erroneously becomes the law for that case if not appealed and reversed. This presupposes, of course, such process as "hears before it condemns."

In this instance, also two appeals were involved: *McWilliams* v. *Blackard* (86 F. 2d 328, decided in 1936), and the cited case, *McWilliams* v. *Blackard* (96 F. 2d 473, decided in 1938). In the first appeal the Court had held the new Section 75 (s) to be invalid in accordance with its Pamp decision. There was no application for certiorari. Thereafter this Court, in *Wright* v. *Vinton,* 300 U. S. 440, held it to be constitutional, expressly reversing the Pamp decision. The farmer debtor (relying chiefly upon the provision in the new Section 75 (s) as

it **then** was which read that "all cases that have been dismissed . . . because of the Supreme Court decision holding the **former Subsection (s)** unconstitutional shall be promptly reinstated . . .") applied for reinstatement which was granted. The creditor then moved to dismiss the petition. On appeal it was held that as no appeal had ever been taken from the original decision which h ld that Section 75 (s) was unconstitutional, it became "The Law of the Case." It rightly held that the new Section 75 (s) which **then applied** requiring reinstatement referred expressly only to decisions that the **former subsection (s)** was unconstitutional. Curiously enough, on the date of this decision, the new Section 75 (s) had shortly before been amended by **striking out the word "former,"** but the court did not consider the new amendment.

In re Archibald.

(4) *In re Archibald*, 14 Fed. Supp. 437, District Court of Minnesota (1936), cited at page 25 of respondents' brief.

This was another case which became involved in the unfortunate uncertainties arising out of the litigation over the constitutionality of the first and second Section 75 (s). A foreclosure sale was conducted while the petition under Section 75 (a) to (r) was pending. The sale was therefore void. *Kalb* v. *Feuerstein*, 308 U. S. 433. After the first Section 75 (s) was held invalid by this Court and before the present Section 75 (s) was passed, the conciliation commissioner filed his final report. This left the farmer debtor with no further proceeding possible, and the District Court dismissed the case. Shortly after the dismissal an owner of an undivided interest in the land conveyed it to the mortgagee-purchaser at the foreclosure sale. Before the statutory period of redemption of the remaining undivided interest had expired, the original farmer debtor filed a second petition under Sec-

tion 75 (a) to (r). After the expiration of the redemption period the mortgagee-purchaser moved to dismiss the case on the ground of (1) the lapse of the right of redemption; (2) prior dismissal; and (3) acquisition by the movant of an undivided interest.

The District Court held that having once invoked Section 75 (a) to (r), the farmer debtor could not again invoke it. This question of the right of a farmer debtor to file a second petition under Section 75 (a) to (r) is not in issue here and the Archibald decision is not applicable. Even upon the questions involved in it we think it is contrary to the decisions of this court in *Wright* v. *Union Central,* 304 U. S. 502; *John Hancock* v. *Bartels,* 308 U. S. 180; and *Borchard* v. *California Bank,* 310 U. S. 311.

In re Henderson.

5. *In re Henderson,* 100 F. 2d 820 (C. C. A. 5, 1938), is again discussed in the respondents' brief at pages 27 to 29.

As the respondents' brief at page 13 has already once relied upon the authority of the decision in the Henderson case as supporting *Massey* v. *Farmers,* 94 F. 2d 526, we have discussed the Massey decision at pages 11 to 12 of this brief and the Henderson decision at page 13 and shown that they have both been overruled by this Court in *John Hancock* v. *Bartels,* 308 U. S. 180. That decision of this Court upheld the dissenting opinion of Judge Hutcheson in the Henderson case in which he declared that the courts have no power to dismiss farmer debtor proceedings.

The Byerly Case.

6. We now come to *Union Joint Stock Land Bank* v. *Byerly,* 310 U. S. 1, which is discussed at pages 45 and 29 and 30 of the respondents' brief.

We understand the majority opinion of this Court in the Byerly case to have been that the bankruptcy court having expressly authorized the state court to proceed

with the sale in foreclosure, the officers of the state court were warranted in relying upon such authorization. This Court did not hold the order of the bankruptcy court to have been lawful; it expressly declared it was error to disregard Section 75 (o). This Court by the majority opinion held that despite the erroneous order of the bankruptcy court "the state court and its officer, the sheriff, were entitled in view of the District Court's plenary jurisdiction over the debtor and his property, to rely upon the order granting permission to make the sale" (Quoted from the bottom of page 7 of the majority opinion).

It is also to be noted in the Byerly case that (1) there was **no dismissal without notice** for it was upon the application of the farmer debtor, and (2) while the case was so dismissed the state court confirmed the sale which had been held by express authorization from the bankruptcy court.

The differences between the Byerly situation and that in this Kalb case are apparent. Here the rights of all parties remain exactly as they were when Mr. Kalb's farmer debtor case was dismissed out of the bankruptcy court. The respondents are still illegally holding possession and Mr. Kalb is still wrongfully deprived of possession. In the meantime this court has reversed the erroneous holding of the Wisconsin courts that the respondents were rightfully in possession and Mr. Kalb was lawfully evicted.

V.

REPLY TO THE RESPONDENTS' ARGUMENT V THAT (A) THE ORDER OF MARCH 17, 1936, IS NOT NOW APPEALABLE AND (B) THE APPEAL FROM THE ORDER OF APRIL 16, 1940, SEEKS A REVIEW OF THE PRIOR ORDER AND SHOULD BE DISMISSED (Pages 30 to 34 of the Respondents' Brief).

The respondents, utterly ignoring the application for rehearing which was accepted by the Court, entertained by it, and denied, contend that the appeal was not timely

because it was taken more than forty days after the dismissal by the order of March 17, 1936 (R. 11). This Court has repeatedly held to the contrary.

The order of March 17, 1936, was void *ab initio* because it was without notice and it remained so. There being no intervening rights, the property and the parties standing precisely as they stood at the time of the dismissal, the lapse of time is immaterial.

Thatcher v. *Powell,* 19 U. S. (6 Wheat.) 119 (1821). Sale for taxes without notice in 1808. Ejectment sued out and sustained. (Date of suit not given but it was later than 1814.) "In summary proceedings . . . those facts ought to appear, in order to show that its proceedings are *coram judice.*"

Shriver v. *Lynn,* 43 U. S. (2 How.) 43 (1844). Court ratified void sale in 1813. Action in ejectment brought in 1817 (4 years later) sustained. "A decree without notice would be treated as a nullity."

Boswell v. *Otis,* 50 U. S. (9 How.) 336 (1850). Sheriff's sale in 1832. Ejectment brought about 1846 (after 14 years) sustained. "No principle is more vital to the administration of justice than that no man shall be condemned in his person or property without notice, and an opportunity to make his defense."

Mitchell v. *St. Maxent,* 71 U. S. (4 Wall.) 237 (1866). Sale on execution without notice to new parties about 1827. Ejectment brought at a date not given. (Case argued in this Court in 1866.) It was argued that the original action being *in rem* lack of notice was not vital. The ejectment was sustained. "Void process confers no right on the officer to sell, and all acts done under it are absolute nullities."

The application of the petitioner for rehearing of the order of dismissal, and its consideration by the District Court suspended or obliterated the finality of the order of dismissal.

There are no terms in a bankruptcy court. No vested right had accrued to the respondents or to anyone else when the application for rehearing and reinstatement were presented. The respective property rights of all persons remain unchanged. **The denial of the application for rehearing fixed the date from which the time for appeal began to run.** The appeal was specifically taken from the order of March 17, 1936 (R. 28, folio 39). The reason for this rule which suspends the finality of an order when an application to rehear it is received and entertained is, no doubt, that it gives the lower courts the fullest opportunity to correct their errors by reconsideration. The result is that there are fewer cases to be reviewed in the higher courts.

Discussion of the Foregoing Statement.

No change whatever took place in the respective rights of the petitioner and the respondents from the entry of the order of dismissal of the farmer debtor proceeding without notice (R. 11) until the application for rehearing and for reinstatement (R. 12 to 17). No new or different rights had become vested. Indeed the decision of this Court in *Kalb* v. *Feuerstein,* 308 U. S. 433, determined that the possession of the respondents was and always had been unlawful and void.

There being no terms in a court of bankruptcy and there having been no change in the respective rights of the mortgagor and the mortgagees, the **entertainment** and **careful consideration** by the bankruptcy court of the application for rehearing, and its **denial of the application** gave the petitioner the right of appeal within the statutory period running from the order of April 16, 1940 (R. 26), which denied the application for rehearing.

Wayne v. Owens.

The precise argument presented here by the respondents was presented to this court in *Wayne* v. *Owens-Illinois,* 300 U. S. 131, and rejected. At page 136, in the

last sentence of the first paragraph of the opinion, it is said:

> "It is true the bankruptcy court applies the doctrines of equity, but the fact that such a court has no terms, and sits continuously, renders inapplicable the rules with respect to the want of power in a court of equity to vacate a decree after the term at which it was entered has ended."

At the bottom of page 137:

> "On the contrary, the rule which governs the case is that the bankruptcy court, in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case on the merits; and even though it reaffirm its former action and refuse to enter a decree different from the original one, the order entered upon rehearing is appealable and the time for appeal runs from its entry."

Gypsy v. Escoe.

Gypsy v. *Escoe*, 275 U. S. 498:

> "The running of the time within which proceedings may be initiated here to bring up judgment or decree for review is suspended by the seasonable filing of a petition for rehearing. But it begins to run from the date of denial of such petition and further suspension cannot be obtained by the mere presentation of a motion for leave to file a second request for rehearing. *Morse* v. *United States*, 270 U. S. 151, 153, 154, 70 L. Ed. 518, 519, 520, 46 Sup. Ct. Rep. 241.
>
> If, however, a timely motion for leave to file the second petition is granted, and the petition is actually entertained by the court, then the time within which application may be made here for certiorari begins to run from the day when the court denies such second petition."

In the present case there was no application for leave to file the petition for rehearing. No such application for leave was necessary. The court **accepted** the petition

for rehearing, **entertained** it, and after **careful consideration denied** it.

Supreme Court Advisory Committee.

The Chairman of the Supreme Court Advisory Committee in the formulation of the new Federal Rules of Civil Procedure said on the subject:

> "Of course, there is nothing in the rules about that, but the well-established rule in the federal courts is that **where time for appeal starts running on a judgment and a party makes a motion** for a new trial or **to set the judgment aside,** and that motion is made seasonably, it not only stops the running of the time but takes away the finality of the judgment for the purposes of appeal, and **the time for appeal then doesn't commence to run until the motion is denied. When it is denied, then you have your full time after that motion is denied to make your appeal.** It does not merely cut out a section of time but it destroys the finality of the judgment, and **even though the time for making a motion for a new trial** under the rules **has ended, if you make a motion for leave to file a motion for a new trial after the time has expired,** even though it isn't seasonable, **and the lower court entertains your motion on the merits and then decided it**—that has obliterated the finality of the judgment and **you don't have to take an appeal until the three months or thirty days,** as the case may be, **from the time the order is made denying your motion** for a new trial." Quoted from the statement of Honorable William D. Mitchell, reported in "Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute," Cleveland, 1938, page 371.

Notes 10 and 11 appended to *Wayne* v. *Owens-Illinois,* 300 U. S. 131, and in *Gypsy* v. *Escoe,* 275 U. S. 498, refer to several previous opinions of this court, among them the following:

Morse v. United States.

Morse v. *U. S.*, 270 U. S. 151 (1926). In the opinion, Chief Justice Taft at pages 153 and 154 said:

> "There is no doubt under the decisions and practice of this court that where a motion for a new trial in a court of law, or a petition for a rehearing in a court of equity is duly and seasonably filed, it suspends the running of the time for taking a writ of error or an appeal, and that **the time within which the proceedings to review must be initiated begins from the date of the denial of either the motion or the petition.**"

Brockett v. Brockett.

In *Brockett* v. *Brockett*, 43 U. S. (2 How.) 238 (1843), Justice Story at page 240 of the opinion said:

> "The next ground is that an appeal has been taken from the refusal of the court below to open the former decree rendered for the appellant. It is plain that no appeal lies to this court in such a matter as it rests merely in the sound discretion of the court below. And if this had been the sole appeal in the case, the appeal must have been dismissed. But **an appeal has also been taken to the first decree** (which was a final decree) rendered by the court . . . now the argument is, that as the original final decree was rendered more than one month before the appeal, it could not operate under the laws of the United States as a supersedeas, or to stay execution of the decree; because to have such an effect the appeal should be made and the bond should be given ten days after the final decree. But the short and conclusive answer to this objection is that the **final decree** of the 10th of May **was suspended by the subsequent action of the court**; and it did not take effect until the 9th of June, and that **the appeal was duly taken** and the appeal bond given **within ten days from the last period.**"

Hughes on Federal Practice.

The text writers on federal practice state the rule as so announced. For example: Hughes, "Federal

Practice," Section 5437: "Under the decisions and practice of the Supreme Court a motion for a new trial in a court of law or a petition for a rehearing in a court of equity, duly and seasonably filed, suspends the running of the time for taking an appeal, so that **the time within which the proceedings to review must be initiated begins to run from the date of the denial of either the motion or petition.**" Also Section 5698: "The time within which an appeal may be taken begins to run from the date of entry of the judgment or decree, unless **a petition for rehearing has been made** at the same term, **and is entertained** by the court, in which case the **time limited for an appeal does not begin to run until the application is disposed of,** though this is at a subsequent term, . . ."

In re Price.

The court below applied this rule to farmer debtor proceedings under similar circumstances in *In re Price*, 99 F. 2d 691 (C. C. A. 7), cited in *Union Joint Stock Land Bank* v. *Byerly*, 310 U. S. 1, 16. The court there said:

> "We are of the opinion that the action of the court in thus dismissing the proceedings [without notice] and allowing the deed to issue should not be permitted to prejudice the debtor's rights to proceed in accordance with the provisions of the statute. Under the ruling of the Supreme Court in *Wayne* v. *Owens-Illinois*, 300 U. S. 131, the court 'has the power, for good reason, to revise its judgment upon seasonable application and before rights have vested on the faith of its action.' There the court held that a court of bankruptcy might, in the exercise of sound discretion, reopen an order dismissing a petition for reorganization under Section 77B of the Bankruptcy Act and rehear the matter on the merits, notwithstanding that the time for appeal had elapsed. We think that case is authority for the action of court in reopening the proceeding here, in effect vacating the order of dismissal, and preventing the use by appellant of rights wrongly obtained by authorization of the issue of the master's deed at a time when

the debtor was entitled to consider that his proceeding under Section 75 was still pending."

Carpenter v. Condor.

Similar procedure was sustained in *Carpenter* v. *Condor,* 108 F. 2d 318 (C. C. A. 9), where the court said at the close of its decision:

> "The time for appeal began to run upon the denial of the petition for rehearing (*Morse* v. *U. S.,* 270 U. S. 151) although it would have been otherwise had the petition not been 'entertained.' *Wayne* v. *Owens-Illinois,* 300 U. S. 131, 137. The petition herein having been entertained, the appeal was in time."

Bowman v. Lopereno.

During the present term in *Bowman* v. *Lopereno,* ..... U. S. ....., 61 S. Ct. 201, this court reaffirmed the principle. At page 203, end of second column, it was said: "The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a **motion for leave to file** such a petition out of time, if not acted on or if denied by the trial court, can not operate to extend the time for appeal. But **where the court allows the filing, and after considering the merits, denies the petition, the judgment of the court as originally entered does not become final, and the time for appeal runs from the date thereof."**

Unquestionably the appeal was taken in accordance with long established federal court rules.

Discussion of Authorities Cited in the Respondents' Fifth Proposition.

1. Section 25 (a), Bankruptcy Act, cited at page 31 of respondents' brief:

The respondents argue that no appeal may be taken after forty days from the entry of the judgment. They quote Section 25 (a) of the Bankruptcy Act. It reads: "Appeals . . . shall be taken within thirty days, . . ., or, if

. . . notice be not served and filed, then within forty days" (This is Section 25 (a) of the Act of 1938. Under the act of 1898 it was the same as to thirty days. The forty day provision did not then exist). This time limitation of course presupposes a valid judgment which, as Daniel Webster said in his oft quoted expression in the Dartmouth College case, "hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial."

By the reasoning of the respondents a judge having a dull day might render a judgment without previous notice that it is to be then heard, without hearing and without any notice of the judgment. That is, he might merely draw an order and pass it to the clerk for entry. The party affected by such a purported judgment after thirty days under the 1898 statute (applicable here), or after forty days under the 1938 statute, would, by respondents' reasoning, be devoid of all remedy. Or, applying that reasoning further, if the creditors of an individual should allege the elements of involuntary bankruptcy by proper petition and proof in court and the court, without notice to the alleged bankrupt, adjudicates him a bankrupt, that unfortunate individual would have no remedy if such adjudication remained without appeal for forty days!

Mintz v. Lester.

2. *Mintz* v. *Lester*, 95 F. 2d 590, cited at page 32 of the respondents' brief: In this case the appellant Mintz **appealed only from the motion for a rehearing.** There was **no appeal from the original order** of dismissal. The petition for appeal as set out in the opinion was: "Comes now Minnie E. Mintz . . . and prays that she be granted an **appeal from the final order . . . denying her motion for a rehearing . . .**" The appeal was therefore limited to the denial of the application for a rehearing, and it was properly denied. Mr. Kalb not only appealed from the orders

of April 16, 1940 (R. 26), and April 17, 1940 (R. 28), but from the final order of March 17, 1936 (R. 11).

Marcy v. Miller.

3. *Marcy* v. *Miller,* 95 F. 2d 611, cited at page 33 of respondents' brief: This appeal expressly appealed from an order overruling a motion to reinstate proceedings. **There was no appeal from the original order of dismissal.** The court said, "An order made in a proceeding in bankruptcy may be reviewed only on an appeal from it, not on appeal expressly taken from a subsequent order entered after the time allowance for appeal from the former order has expired." The effect of an application for rehearing was not mentioned.

In re Irving-Austin.

4. *In re Irving-Austin Building Corporation,* 96 F. 2d 905, cited at page 33 of the respondents' brief: In Section 77B proceedings a creditor appealed from an order confirming a plan of reorganization. On the appeal the creditor objected to a previous order of classification, which had been heard and finally decided without either objection or appeal. The court very properly held that "An order in a bankruptcy proceedings, from which appeal may be had, may be reviewed only upon an appeal from that order and not on an appeal from a subsequent order." The effect of an application for rehearing was not suggested or considered.

CONCLUSION.

It seems to the petitioner clear that the opposition of the respondents has not disproved the grounds for certiorari as stated in the petition for certiorari, namely that:

First. The restraining order is in direct conflict with the decision of this court in *Kalb* v. *Feuerstein,* 308 U. S. 433. It is also directly contrary to the holding of the bankruptcy court that it had no authority or power to issue it.

Second. The petitioner was deprived of due process of law by the dismissal of his proceeding without notice, either before or after the dismissal. The dismissal rendered the decision of this court in *Kalb* v. *Feuerstein*, 308 U. S. 433, moot and without effect when it was rendered. It rendered ineffective the ten unanimous decisions of this court that every farmer debtor is entitled to the benefits of Section 75 in full accord with the spirit and purpose sought to be attained by the Congress in enacting it. The dismissal is a departure from accepted legal principles and judicial procedure. The decision of the district court and of the appellate court below is in direct conflict with the previous decisions of that appellate court and of the federal courts of other circuits.

Respectfully submitted,

ELMER MCCLAIN,
Lima, Ohio,
WILLIAM LEMKE,
Washington, D. C.,
Counsel for Petitioner.

Lima, Ohio.
April 12, 1941.